BEFORE THE
DIVISION OF MEDICAL QUALITY
MEDICAL BOARD OF CALIFORNIA
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

In the Matter of the Accusation Against: JERALD B. FELDER, M.D. 1861 Semur Road Pensacola, Florida 32503 Physician's and Surgeon's Certificate No. C25390, Respondent.	No. 16-94-44483 OAH No. N-9505024

DECISION

The attached Proposed Decision of the Administrative Law Judge is hereby adopted by the Medical Board of California as its Decision in the above-entitled matter.

This Decision shall become effective on January 2, 1996.

IT IS SO ORDERED November 30, 1995.

BEFORE THE
DIVISION OF MEDICAL QUALITY
MEDICAL BOARD OF CALIFORNIA
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

In the Matter of the Accusation Against: JERALD B. FELDER, M.D. 1861 Semur Road Pensacola, Florida 32503 Physician's and Surgeon's Certificate No. C25390, Respondent.	)	No. 16-94-44483 OAH No. N-9505024

PROPOSED DECISION

The matter came on regularly for hearing before Jaime René Román, Administrative Law Judge, Medical Quality Hearing Panel, Office of Administrative Hearings, Sacramento, California, on November 6, 1995. Complainant was represented by Daniel J. Turner, Deputy Attorney General, Health Quality Enforcement Section, California Department of Justice. Respondent Jerald B. Felder, M.D. (hereinafter "Respondent"), appeared and represented himself.

During the hearing, Complainant moved to amend, without objection by Respondent, the Accusation by substituting "1994" for "1995" at page 3, line 4. The motion was granted by the Administrative Law Judge.

Evidence was received and the matter deemed submitted on November 6, 1995.

The Administrative Law Judge finds the following:

* * * * *

FINDINGS OF FACT

Procedural Findings

I

Complainant, Dixon Arnett, as Executive Director of the Medical Board of California (hereinafter "the Board"), brought the Accusation on April 6, 1995, in his official capacity.

II

On August 14, 1963, Respondent was issued Physician's and Surgeon's Certificate No. C25390 by the Board. His certificate is in full force and effect.

Factual Findings

III

On September 14, 1994, Respondent, a commissioned officer in the Department of Navy, Bureau of Medicine and Surgery, had his supplemental privileges in endoscopic sinus surgery revoked.

IV

The facts and circumstances giving rise to the discipline referenced in Finding No. III arose from three surgical complications related to endoscopic sinus surgery attributed to Respondent's inadequate training.

V

Respondent, retiring from the Department of Navy on October 1, 1994, obtained employment as a physician and surgeon with a state prison in Oregon on February 7, 1995.

VI

Respondent, without denying the discipline set forth in Finding No. III, and despite the underlying facts and circumstances referenced in Finding No. IV, claims he has sufficient training and experience to safely conduct endoscopic sinus surgery.

VII

Factors concerning the credibility of evidence are contained, in part, in Evidence Code sections 780, 786, 790 and 791.

A. Respondent's claims as set forth in Finding No. VI are not found credible or competent. Respondent, notwithstanding Board ENT certification, lacks sufficient and particular training to conduct endoscopic sinus surgery safely.

B. Respondent, visibly affected by the proceedings in Finding Nos. I and III, demonstrated by his demeanor and self-serving

characterizations, a lack of insight into the significance of these proceedings.[1]

Circumstances in Mitigation

VIII

Respondent, licensed since 1963 (Finding No. II), has no other record of discipline.

IX

Respondent, unwilling to expend the financial resources[2] necessary to meet the minimal requirements of additional training recommended by the Department of Navy[3] is sufficiently possessed of surgical skill, knowledge and training to undertake the additional training required to be sufficiently proficient in endoscopic sinus surgery.

Costs Findings

X

Although pled in the Accusation, no evidence related to the costs and fees paid and incurred by the Board in the investigation and prosecution of this matter was presented.

* * * * *

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[1]These proceedings are to protect the public, the medical profession, maintain professional integrity, its high standards, and preserve public confidence. These proceedings are not for the primary purpose of punishing an individual (Camacho v. Youde (1979) 95 Cal.App.3d 161, 165), including Respondent.

[2]The financial impact of discipline on a respondent is not a consideration for proper determination (cf. Drociak v. State Bar (1991) 52 Cal.3d 1085, 1090).

[3]The Department recommended [Exhibit 3]: "Supplemental endoscopic sinus surgery privileges which were placed in abeyance and not requested on subsequent application for renewal of priviliges (sic) should be restored only after the following three things have been accomplished: (1) Completion of a formal course in functional endoscopic sinus surgery to include cadaver dissection; (2) Observation of cases performed by an experienced endoscopist; (3) Performance of cases with monitoring by an experienced endoscopist."

DETERMINATION OF ISSUES

I

Cause exists to revoke or suspend the certificate of Respondent as a physician and surgeon for discipline imposed by another jurisdiction pursuant to the provisions of Business and Professions Code section 2305 as set forth in Finding Nos. III and IV.

II

Cause does not exist to direct Respondent to pay costs in the investigation, prosecution or enforcement of this matter pursuant to Business and Professions Code section 125.3 as set forth in Finding No. XII.

III

Complainant's counsel, to his credit, does not contend that revocation of Respondent's certificate is warranted.

In exercising disciplinary authority, an Administrative Law Judge of the Medical Quality Hearing Panel is mandated to "take action that is calculated to aid in the rehabilitation of the licensee, or where, due to a lack of continuing education or other reasons, restriction on scope of practice is indicated, to order restrictions as are indicated by the evidence." Business and Professions Code section 2229(b). "Where rehabilitation and protection are inconsistent, protection shall be paramount." Business and Professions Code section 2229(c).

It is abundantly clear that Respondent possesses sufficient skill, training and experience (Finding No. IX) to compel his continued licensure with due regard to the protection of the public. The evidence, having established that rehabilitation and protection are not inconsistent, compels an order calculated to aid in Respondent's rehabilitation.

Accordingly, giving due consideration to the facts and circumstances underlying the Accusation (Finding Nos. III - IV) and the circumstances in mitigation and rehabilitation (Finding Nos. VIII - IX), the public interest will not be adversely affected by the continued issuance of a properly conditioned license to Respondent.

* * * * *

ORDER

Certificate No. C25390 issued to Respondent Jerald B. Felder, M.D., is suspended pursuant to Determination of Issues Nos.

I and III; provided, however, said suspension is stayed and Respondent placed on probation for five years upon the following terms and conditions:

I

Within 15 days of the effective date of this Decision, Respondent shall provide the Division of Medical Quality, or its designee, proof of service that Respondent has served a true copy of this Decision on the Chief of Staff or the Chief Executive Officer at every hospital or medical group where privileges or membership extended to Respondent or where Respondent is employed to practice medicine and on the Chief Executive Officer at every insurance carrier where malpractice insurance coverage is extended to Respondent.

II

Within 90 days of the effective date of this Decision, Respondent shall submit to the Division of Medical Quality or its designee for prior approval, a clinical training program or educational program. The exact number of hours and specific content of the program shall be determined by the Division or its designee but shall, at a minimum, include:

A. Completion of a formal course in functional endoscopic sinus surgery to include cadaver dissection.

B. Observation of cases performed by an experienced endoscopist.

C. Performance of cases with monitoring by an experienced endoscopist.

III

Respondent, at his expense, shall take and pass an oral clinical examination in a subject to be designated and administered by the Division of Medical Quality or its designee. This examination shall be taken within one year of the effective date of this Decision. If Respondent fails the first examination, Respondent shall be allowed to take and pass a second examination, which may consist of a written as well as oral examination. The waiting period between the first and second examinations shall be at least three months. If Respondent fails to pass the first and second examinations, Respondent may take a third and final examination after waiting a period of six months. Failure to pass the oral clinical examination within two years after the effective date of this Decision shall constitute a violation of probation. Respondent shall not perform endoscopic sinus surgery until Respondent has passed the required examination and has been so

notified by the Division or its designee in writing. This prohibition shall not bar Respondent from practicing in a clinical training program approved by the Division or its designee.

IV

Respondent shall obey all federal, state and local laws, and all rules governing the practice of medicine in California, and remain in full compliance with any court ordered criminal probation, payments and other orders.

V

Respondent shall submit quarterly declarations under penalty of perjury on forms provided by the Division of Medical Quality, stating whether there has been compliance with all the conditions of probation.

VI

Respondent shall comply with the Division of Medical Quality's probation surveillance program. Respondent shall, at all times, keep the Division informed of his addresses of business and residence which shall both serve as addresses of record. Changes of such addresses shall be immediately communicated in writing to the Division. Under no circumstances shall a post office box serve as an address of record.

VII

Respondent shall appear in person for interviews with the Division of Medical Quality, its designee or its designated physician(s) upon request at various intervals and with reasonable notice.

VIII

In the event Respondent should leave California to reside or to practice outside the State or for any reason should Respondent stop practicing medicine in California, Respondent shall notify the Division of Medical Quality or its designee in writing within 10 days of the date(s) of departure and return or the date(s) of non-practice within California. Non-practice is defined as any period of time exceeding 30 days in which Respondent is not engaged in any activities defined in Sections 2051 and 2052 of the Business and Professions Code. Periods of temporary or permanent residence or practice outside California or of non-practice within California, as defined in this condition, will not apply to the reduction of the probationary period.

IX

Upon successful completion of probation, Respondent's certificate will be fully restored. Respondent may petition for modification or termination of probation upon: 1) successfully passing the oral competency examination, and 2) if at least one year has elapsed from the effective date of this Decision.

X

If Respondent violates probation in any respect, the Division of Medical Quality, after giving Respondent notice and the opportunity to be heard, may revoke probation and carry out the disciplinary order that was stayed. If an Accusation or Petition to Revoke Probation is filed against Respondent during probation, the Division shall have continuing jurisdiction until the matter is final, and the period of probation shall be extended until the matter is final.

XI

Following the effective date of this Decision, if Respondent ceases practicing due to retirement, health reasons or is otherwise unable to satisfy the terms and conditions of probation, Respondent may voluntarily tender his certificate to the Board. The Division of Medical Quality shall exercise its right to evaluate Respondent's request and to exercise its discretion whether to grant the request or take any other action deemed appropriate and reasonable under the circumstances. Upon formal acceptance of the tendered certificate, Respondent shall no longer be subject to the terms and conditions of probation.

Dated: November 9, 1995

JAIME RENÉ ROMÁN
Administrative Law Judge
Medical Quality Hearing Panel
Office of Administrative Hearings

REDACTED

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Attorneys for Complainant

BEFORE THE
DIVISION OF MEDICAL QUALITY
MEDICAL BOARD OF CALIFORNIA
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

In the Matter of the Accusation Against: JERALD B. FELDER, M.D. 1861 Semur Road Pensacola, Florida 32503 California Physician and Surgeon Certificate No. C25390 Respondent.	NO. 16-94-44483 ACCUSATION

Dixon Arnett, for causes for discipline, alleges:

1. Complainant Dixon Arnett makes and files this accusation in his official capacity as Executive Director of the Medical Board of California (hereinafter referred to as the "Board").

2. On August 14, 1963, the Medical Board of California issued physician and surgeon certificate number C25390 to Jerald

B. Felder, M.D. The certificate will expire June 30, 1995, unless renewed.

3. Under Business and Professions Code section 2234, the Division of Medical Quality shall take action against any licensee who is charged with unprofessional conduct.

Under Business and Professions Code section 2305, the revocation, suspension, or other discipline by another state of a license or certificate to practice medicine issued by the state shall constitute unprofessional conduct against such licensee in this state.

Under Business and Professions Code section 118(b), the expiration of a license shall not deprive the Board of jurisdiction to proceed with a disciplinary action during the time within which the license may be renewed, restored, or reinstated.

Under Business and Professions Code section 2428, a license which has expired may be renewed any time within five years after expiration.

Under Business and Professions Code section 125.3, the Medical Board of California may request the administrative law judge to direct a licentiate found to have committed a violation or violations of the licensing act to pay a sum not to exceed the reasonable costs of the investigation and enforcement of the case.

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4. Respondent has subjected his physician and surgeon certificate to discipline under Business and Professions Code section 2305 on the grounds of unprofessional conduct in that on September 14, 1995, the Department of the Navy, Bureau of Medicine and Surgery limited respondent's clinical privileges due to professional impairment by revoking respondent's supplemental privileges in endoscopic sinus surgery. The privileging authority concluded that respondent was not qualified to safely perform endoscopic sinus surgery due to a lack of appropriate training. Attached as Exhibit A and incorporated by reference is a true and correct copy of the decision rendered by the Department of the Navy.

WHEREFORE, complainant prays a hearing be had and that the Medical Board of California make its order:

1. Revoking or suspending physician and surgeon certificate number C25390, issued to Jerald B. Felder, M.D.

2. Prohibiting Jerald B. Felder, M.D. from supervising physician assistants.

3. Ordering Jerald B. Felder, M.D., to pay to the Medical Board of California its costs for investigation and enforcement according to proof at the hearing, pursuant to Business and Professions Code section 125.3.

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4. Taking such other and further action as may be deemed proper and appropriate.

DATED: April 6, 1995

DIXON ARNETT
Executive Director
Medical Board of California
Department of Consumer Affairs
State of California

Complainant

03573160-
SA95AD0399
(SM 3/15/95)

E X H I B I T A

DEPARTMENT OF THE NAVY
NAVAL HOSPITAL
6000 WEST HIGHWAY 98
PENSACOLA FL 32512-0003

6320
Code OOJ
17 December 1993

FOR OFFICIAL USE ONLY

From: Commanding Officer, Naval Hospital Pensacola
To: CAPT Jerald B. Felder, MC, USN, [redacted]

Subj: NOTICE OF SURGICAL PRIVILEGES SUSPENSION AND ADVICE OF RIGHTS

Ref: (a) Commanding Officer ltr 6320 Code OOJ of 19 October 1993
(b) [redacted]MC, USN investigative report of 17 Dec 93
(c) SECNAVINST 6320.23
(d) BUMEDINST 6320.67

1. After careful review of the information obtained from references (a) and (b), I have concluded that there is sufficient information to indicate that you are not able to safely perform any of your surgical privileges. Therefore, in addition to your supplemental privilege of endoscopic sinus surgery, your core surgical privileges, in both ambulatory and inpatient settings, are suspended. This action is effective immediately. Your non-surgical, clinical privileges remain unaffected.

2. Per references (c) and (d), you are advised that this action is based upon evidence that your surgical practice does not comply with current standards of care. Furthermore, there are indications that your surgical practice may be adversely affected by the existence of a mental disorder which limits your judgement and impedes your ability to deliver quality health care.

3. You are further advised of the following rights and information:

a. All of your surgical privileges could be permanently revoked based upon peer review recommendation.

b. The right to a reasonable opportunity (normally within 7 days) to consult with counsel before electing or waiving any of the rights in this paragraph.

c. The right to have your case heard at an administrative hearing by the peer review panel and to be present at the hearing.

d. The right to representation by counsel at the hearing.

e. The right to present evidence at the hearing.

f. The right to waive the rights in paragraphs 3c through 3e of this letter.

Subj: NOTICE OF CLINICAL PRIVILEGES SUSPENSION AND ADVICE OF RIGHTS

4. If the final action after completion of all appeal procedures is to deny, limit, or revoke your surgical privileges, that fact must be reported to the Bureau of Medicine and Surgery where the Surgeon General of the Navy will determine the need for further reporting to the Federation of State Medical Boards, state or states licensure, National Practitioner Data Bank or other professional clearinghouses, and as applicable, the Office of the Secretary of Defense (Health Affairs), and other organizations or agencies as indicated by references (c) and (d).

5. You are advised that failure to respond after a reasonable opportunity to consult with counsel constitutes a waiver of the rights in paragraph 3c through 3e of this letter. You are further advised that failure to appear without good cause at the hearing constitutes waiver of the right to be present at the hearing.

6. This action may result in limitation or revocation of your core surgical privileges, as well as your supplemental privilege of endoscopic sinus surgery. Per references (c) and (d), you are entitled to request a personal appearance and administrative hearing before the peer review panel reviewing your case. Any request for a personal appearance and administrative hearing before the peer review panel should be made, in writing, within 7 days from the date of receipt of this letter.

[redacted]

Copy to:
Chairman, Credentials Committee
Staff Judge Advocate
Professional Affairs Coordinator

30 March 1994

From: CAPT [redacted], MC, USN
To: Commanding Officer, Naval Hospital Pensacola

Subj: FINDINGS OF PEER REVIEW PANEL ICO CAPT JERALD B. FELDER

Ref: (a) [redacted] MC, USN: Informal Investigation Into Allegations of Substandard Surgical Techniques in the Case of Capt Jerald Felder, MC, USN [redacted] dated December 17, 1993.

1. This letter is forwarded to convey the findings of the Peer Review Panel held for CAPT Jerald B. Felder on 16 February and 15 March 1994. The findings of the panel address the following issues: (1) Operating times; (2) Complication rate; (3) Impairment issues; (4) Patient interactions; (5) Standards of care; and (6) Training needed to perform functional endoscopic sinus surgery (FESS).

2. Operating Times

Opinion 1(a) in Reference (a) expresses concern for CAPT Felder's slowness in the operating room. There was no disagreement by any party in this hearing with the finding that CAPT Felder's average operating times for all procedures are longer than for either [redacted] or [redacted] the two physicians for whom comparable surgery statistics were available, as well as being significantly longer than the average for ENT surgeons in general. For instance, his records show an average total anesthesia time for his tonsillectomies of 139 minutes, vs. 102 minutes for [redacted] and 83 minutes for [redacted] Although the differences noted are felt to be on the basis of operating times rather than anesthesia times, this was not documented. A similar pattern was noted with CAPT Felder's other surgical procedures according to the statistics provided by the QI Department and the Operating Room.

The concern with lengthy operating times is threefold: first, the longer the time that a general anesthetic is administered, the more chance there is of incurring anesthetic-related complications; second, the longer the operating time, the greater the potential for intraoperative bleeding complications as a result of decreased vasoconstriction; and third, slower operating times may result in a need for deeper anesthesia than would otherwise be required.

While the need for longer anesthesia may result in an increased potential for anesthetic-related complications, no documentation was provided that this has been a problem in the 357 cases CAPT Felder performed in 1993 and 1993. Intraoperative bleeding complications occurred primarily during the FESS procedures and will be discussed below. Information from a survey of anesthesia techniques used for ENT surgery at local civilian hospitals provided by [redacted] indicated that the anesthesia techniques used for CAPT Felder's cases were within the norms for civilian ENT surgery.

In summary, while it is acknowledged that CAPT Felder is a very slow surgeon, this fact was not in and of itself seen as a reason to restrict core ENT priviliges.

3. Complication Rate

Opinion 5 of reference (a) stated that there is no conclusive evidence that CAPT Felder has a higher complication rate than usual. Testimony presented to the Peer Review Panel substantiated this statement with 7 complications being reported in 357 cases for a complication rate of 1.9% based on data presented by the QI department. Although the complication statistics for [redacted] and [redacted] were not provided to the panel, it was verbally stated to the panel that CAPT Felder's complication rate is no worse than theirs. The Panel concluded that there was no overall pattern of increased complications noted with CAPT Felder's surgery cases.

The current credentialling actions were brought about by three recent complications involving endoscopic sinus surgeries. These may be related to CAPT Felder's training in this procedure as discussed in paragraph 7 below.

4. Patient Complaints

Opinion 2 of reference (a) stated that CAPT Felder is having significant problems with patient interactions as evidenced by numerous patient complaints. There was only one command patient contact complaint documented which was filed by a patient with life-threatening nasal bleeding that CAPT Felder was able to control. The exchange between CAPT Felder and the patient in this instance allegedly contained an ill-timed question about the patient's HIV status, but the encounter was in the context of an extremely stressful clinical situation.

There were statements in reference (a) from ENT corps staff and a Family Practice resident that patients find CAPT Felder annoyingly compulsive and slow. This is very believable on the basis of his obsessive/compulsive personality and history of depression. Additional comments contained in opinion 2 concerning rudeness and abruptness with patients were not substantiated.

The suggestion that CAPT Felder needlessly scares parents of tympanostomy patients by warning them of the possibility of an anesthesia death is unjustified. This is an entirely appropriate warning for anyone undergoing general anesthesia.

5. Impairment Issues

Opinions 1(a) through 1(d) of reference express concern about CAPT Felder's ability to perform his duties in light of his multiple medical complaints. The panel heard testimony from CAPT Felder's neurological and psychiatric consultants concerning his health. CAPT Felder was noted to suffer from an Obsessive Compulsive disorder and depression, but was found to have no demonstrable neurologic deficits. Both consultants felt that there were no medical problems which rendered CAPT Felder unfit for duty.

Enclosures (35) and (36) of reference (a) are ophthalmology consultations concerning CAPT Felder's vitreous floaters. Vitreous floaters are very common at middle age and beyond, and both ophthalmic consultants felt that these floaters should not interfere with surgery.

6. Standard of Care Issues

Opinion 1(f) of reference (a) expressed concern over CAPT Felder's continued use of sinus washings when both the ENT Specialty Advisor and the ENT corps staff felt that this treatment modality is outdated. Testimony heard by the Panel revealed that this procedure is still used by some ENT staff physicians at both NH San Diego and the National Naval Medical Center, Bethesda. A reference from the literature dated December 1991 on the Diagnosis and Treatment of Acute Sinusitis mentions antral irrigation as an appropriate treatment for recurrent or recalcitrant sinusitis.

7. Training for FESS Surgery

The three surgical complications which brought about the current credentialling actions were all related to endoscopic sinus surgery. Opinion 1(g) of reference (a) stated that CAPT Felder's training to perform FESS procedures is inadequate. This was verified by CAPT Hunsaker, the ENT Specialty Advisor, who stated that ENT practitioners who were not trained in this procedure as a resident should attend a formal FESS training course which includes cadaver dissections, observe an experienced FESS surgeon perform a number of cases, and finally be monitored during his or her initial cases by an experienced FESS surgeon before performing these procedures on their own. CAPT Felder has not had this training.

8. Recommendations

Based on the above findings, the Peer Review Panel recommends that the following credentialling actions be taken:

a) Core ENT surgical privileges currently in abeyance should be restored. Core ENT medical privileges should be continued.

b) Supplemental endoscopic sinus surgery privileges which were placed in abeyance and not requested on subsequent application for renewal of priviliges should be restored only after the following three things have been accomplished:

(1) Completion of a formal course in functional endoscopic sinus surgery to include cadaver dissection;

(2) Observation of cases performed by an experienced endoscopist;

(3) Performance of cases with monitoring by an experienced endoscopist.

The specifics of the didactic course in FESS procedures as well as the number and location of observed and monitored cases should be coordinated with the ENT Specialty Advisor.

Very Respectfully,

[redacted]

CAPT MC USN

12 April 1994

From: Captain G. E. Felder, MC, USN, [redacted]/2103
To: Commanding Officer, Naval Hospital, Pensacola

Subj: CAPTAIN FELDER'S COMMENTS CONCERNING THE PEER REVIEW PANEL REPORT

Ref: (a) Captain [redacted], Jr.,MC USN letter to CO NAVHOSP Pensacola of 30 March 1994 "FINDINGS OF PEER REVIEW PANEL ICO CAPT GERALD E. FELDER"
(b) BUMEDINST 6320.67
(c) CO NAVHOSP Pensacola ltr 6320 Code 30J/6 Apr 1994
(d) Specialty Advisor, Otolaryngology ltr 6401 42DNA 24 Sept 93

1. Receipt of references (a, and (c, are acknowledged.

2. In accordance with the provisions of reference (b) I wish to respond to reference (a) with corrections of fact and comments on the peer review panel proceedings and recommendations.

3. Paragraph 7. as well as sentences in paragraphs 2. and 3. of reference (a) refer to three surgical complications related to endoscopic sinus surgery. This characterization is erroneous. One of the three surgical complications cited (R.C.) had no endoscopic surgery performed. The other two complications (S.G. and H.V.) did have endoscopic sinus surgery but the complications were not related to use of the endoscopes. This is affirmatively stated by [redacted] as confirmed by reference (d) paragraph 2. A thorough review of all my surgical cases revealed that I have had no complications due to endoscopic sinus surgery.

Paragraph 7 further states that I have not had a formal FESS (Functional Endoscopic Sinus Surgery) training course which includes cadaver dissection. While it is true that I have not had a formal FESS training course including cadaver dissection I have had FESS training, both by reading on my own and in formal courses without cadaver dissection (see Respondents Exhibit 6 for the panel hearing). [redacted] a noted authority on FESS whose reputation for outstanding expertise on FESS was acknowledged by [redacted] and [redacted] has presented research which shows that there is no decrease in complication rates between those surgeons who have had formal FESS courses and those who have not had a formal course. (See Respondent's Exhibits 2, 3, and 32 for the panel hearing). Most surgeons doing FESS who have not had formal courses with cadaver dissection are like myself, well-trained in intranasal ethmoidectomy and sphenoidectomy during our residencies, and have been safely performing live dissections with headlight and endoscopic sphenoethmoidectomies for many years. Use of endoscopes [illegible] the safety of the procedure by

enhancing visualization. (See also Respondent's Exhibit 23 pages 759 and 760). [redacted] states that a resident should attend a formal FESS training course which includes cadaver dissections (to learn the anatomy), observe an experienced FESS surgeon perform a number of cases, and finally be monitored during his/her initial cases by an experienced FESS surgeon before performing these procedures on his/her own. [redacted] testified under oath at the hearing that more than half of the Navy ENT surgeons who perform FESS have not attended formal training programs. He also acknowledged that it is only within the past two or three years that graduating Navy residents have been trained in FESS. I agreed that I would not request FESS privileges if the standards for granting those privileges were to be changed, and I subsequently changed my application for renewal of surgical privileges. If the Navy changes its policies on requirements for performing FESS, it should be a Navy-wide policy applied equally to all. To enforce it only on one individual who has had no complication related to FESS while 'grandfathering' everyone else is patently unfair, arbitrary, and capricious.

4. Paragraph 2. of reference (a) lists three concerns about lengthy operating times. With good anesthesia the risk of complications due to the length of anesthesia is minuscule in even my longest cases. The record shows I have had no complications from anesthesia due to the time the patient is under anesthesia. And, with complete and appropriate preoperative evaluation, complications in the future are very unlikely. Intraoperative bleeding with longer operative times is manageable by planning surgery so that procedures requiring little or no bleeding, such as ethmoidectomies and sphenoidectomies, are done prior to loss of vasoconstrictive effects and less delicate, low risk portions of the procedure are performed later in the operation when bleeding will not interfere significantly with the surgery. A very thorough review of my operative cases, both by myself and by the hospital, fails to show any incidents where I had any difficulty in managing bleeding during or after surgery. Finally, if a general anesthetic is selected for use with the patient then the depth of anesthesia required for the patient to tolerate the endotracheal tube is sufficient for the patient to tolerate the operation. The depth of anesthesia does not need to be increased because of the length of the surgery. The only way that the length of the surgery would influence the depth of anesthesia would be in the selection of the method of achieving anesthesia - namely local versus general. Since general anesthesia is the standard of care for the ENT community in Pensacola and in much of the rest of the United States as shown by the references presented to the panel, the choice of anesthetic should not be an issue.

5. Paragraph 3. of reference (a) concerns my complication rate. Although the statements in it are for the most part accurate, they neglect important considerations. First, all seven occurrences were Category I and II. I have had no occurrences higher than Category II, even including the three cases of nasal bleeding. Second, not all of the seven occurrences were mine even though they happened with my patients. Lastly, despite inclusion of these cases in calculating my complication rate the rate is still very low and well beneath acceptable standards quoted by the Specialty Advisor for Otolaryngology, and by the former Head, ENT Department of Portsmouth Naval Hospital (Enclosure [redacted] investigative report and oral testimony of [redacted] during the panel hearing).

6. There is no objective or factual basis for suspension of any of my surgical privileges. Any such suspension will result in an entry in my file in the National Practitioner Data Bank and thus lifelong damage to my professional career. Therefore, I formally request that the abeyance and suspension of my PECL and all other ENT surgical privileges be rescinded and all record of these actions be removed from my Individual Credentials File and from any and all other documents or files related to my competency or fitness to perform ENT surgery.

Very Respectfully,

Gerald B. Felder

GERALD B. FELDER
CAPTAIN MC USN

DEPARTMENT OF THE NAVY
NAVAL HOSPITAL
6000 WEST HIGHWAY 98
PENSACOLA FL 32512-0003

6320
Code OOJ
22 April 1994

FOR OFFICIAL USE ONLY

From: Commanding Officer, Naval Hospital Pensacola
To: CAPT Jerald B. Felder, MC, USN, [redacted]/2100

Subj: NOTICE OF PRIVILEGING AUTHORITY'S FINAL DECISION AND ADVICE OF RIGHTS

Ref: (a) Peer Review Panel Report of 30 March 94
(b) CAPT J. Felder's ltr of 12 April 94
(d) SECNAVINST 6320.23
(e) BUMEDINST 6320.67

1. After careful review of the information contained in references (a) and (b), I have concluded that there is sufficient evidence to indicate that you are not qualified to safely perform endoscopic sinus surgery. Therefore, your supplemental privilege allowing you to perform this procedure at Naval Hospital Pensacola is revoked, effective immediately. Your core surgical privileges are immediately restored.

2. Per references (d) and (e), you are advised that this adverse action supports the Peer Review Panel's findings and recommendations that your supplemental privilege of endoscopic sinus surgery should not be restored due to your not having had appropriate formal training to do the procedure. I feel this recommendation was commensurate with the nature of the allegations and the preponderance of the evidence. Consequently, I cannot accept your argument in reference (b) that your experience, your readings, and courses which you have attended, which do not meet the criteria of appropriate training as set forth by the Peer Review Panel and other experts in the field, qualifies you to perform endoscopic sinus surgery without posing a risk to patient safety.

3. In accordance with reference (e), it is my duty as the privileging authority to take such action as is necessary to safeguard patient care from potential risk and to ensure quality healthcare. Because endoscopic sinus surgery carries with it such inherent risks as blindness, CSF leak and death; because the Navy's Otolaryngology Specialty Advisor, [redacted] MC, USN, in his specialty review and in his testimony said you use "unorthodox and incomplete techniques" in performing this procedure; and because both ENT specialists, [redacted] and [redacted], stated that you did not have adequate training to safely perform this procedure and therefore you should not be privileged to perform it, I felt there was potential risk to patient safety and to quality healthcare in allowing you to perform endoscopic sinus surgery. While you did not request renewal of your supplemental privilege of endoscopic sinus surgery when your privileges came up for renewal subsequent to the suspension of that privilege, my decision and action must address the period when you had the privilege and this process was begun.

ENCLOSURE (2)

Subj: NOTICE OF PRIVILEGING AUTHORITY'S FINAL DECISION AND ADVICE OF RIGHTS

4. You are further advised of the following rights and information:

a. You may appeal any final decision to deny, limit, or revoke clinical privileges. The appeal must be submitted, in writing, to BUMED via the privileging authority within 14 days of receipt of the privileging authority's final decision. The grounds for appeal must remain in effect during the appeal.

b. Appeal decisions will ordinarily be limited to a review of the stated grounds for appeal. If procedural error not raised by the practitioner in his or her appeal is identified during the appellate review that affects the fundamental fairness of the peer review process, corrective action may be directed.

c. For new evidence to be considered for the first time on appeal, proof must be shown that the information was not available at the time of the hearing and could not have been discovered by the practitioner at that time even with the exercise of due diligence.

d. BUMED will review the stated grounds for appeal, the evidence of record, and any new information permitted under paragraph (c). The standard for decision on appeal is whether the privileging authority abused its discretion. After consultation with the chief of the appropriate corps on substantive professional issues and obtaining legal review, BUMED will grant or deny the practitioner's appeal. The practitioner will be informed, in writing, of the decision. BUMED decision is final.

Copy to:
Chairman, Credentials Committee
[redacted]
Professional Affairs Coordinator

05 May 1994

From: Captain J. B. Felder, MC, USN

To: BUMED

Via: Commanding Officer, Naval Hospital Pensacola

Subj: APPEAL OF PRIVILEGING AUTHORITY'S FINAL DECISION ON CAPTAIN FELDER'S SURGICAL PRIVILEGES

Ref:
(a) CO NAVHOSP Pensacola ltr 6320 Code 00J 22 April 1994
(b) FINDINGS OF PEER REVIEW PANEL ICO CAPT JERALD B. FELDER - [redacted] Jr., MC, USN, ltr 30 March 1994
(c) SECNAVINST 6320.23
(d) BUMEDINST 6320.67
(e) INCOMPLETE Transcript of hearing convened 1 February 1994

1. I respectfully appeal and request review of the determination that my privileges to perform FESS (Functional Endoscopic Sinus Surgery) be revoked for the period beginning 19 October 1993 on the grounds that the privileging authority abused its discretion by requiring that I undergo additional training when I have been performing this procedure for the past 3 years with no complications related to it [page 36 of Reference (e)], and more than half of the Navy ENT surgeons who perform FESS have not had the training now required of me [untranscribed portion of hearing which should have been in Reference (e)].

Contrary to and in violation of the requirements of Reference (d), the transcript of the hearing provided to me on 04 May 1994 was incomplete, so I am unable to refer you to specific portions of the record where some of my statements (below) are documented. The Recorder (who was also acting as the advocate for my accusers) now admits that significant portions of [redacted] and [redacted] testimony (which were favorable to me) were not transcribed, and now believes he failed to record those portions of the hearing. The Recorder has agreed to meet with my Counsel to attempt to reconstruct the substance of the testimony lost by the Recorder. Consequently I will have to supplement this communication to you as soon as the entire transcript is provided to me by the privileging authority. If the Recorder refuses to admit to substantive testimony provided during the hearing, which due to his fault were lost, I will have no choice but to request a repeat hearing so that a complete record can be created in accordance with the requirements of Reference (d).

2. I base my appeal on the following:

A. Subsection 4.c.(3) of Reference (d) requires that the affected practitioner be guaranteed "due process, fundamental fairness and equal treatment." The application of [redacted] proposed FESS training requirements

should not be selectively used to remove only my FESS privileges. If the policy is going to be established that the training [redacted] recommends is required for FESS privileges, then every physician in the Navy should be judged by the same rules. According to [redacted] testimony before the Peer Review Panel, over half of all ENT surgeons performing FESS in the Navy lack the training which he advocates [untranscribed portion of hearing which should have been in Reference (e)]. That would require that all others who, like me, were "grandfathered" must have their FESS privileges revoked effective 19 October 1993.

B. Reference (b) demonstrates that the panel disregarded or misapprehended critical evidence in reaching its conclusion.

i. The Specialty Advisor, [redacted] stated that none of the three occurrences which he reviewed was related to FESS. In fact in one of the three occurrences, no FESS was performed. All references throughout the entire process have erroneously characterized those three occurrences to be FESS complications, despite the written and oral statements by the Specialty Advisor that none of these was related to FESS [page 36 of Reference (e)].

ii. The training which the Specialty Advisor advocated as the standard by which a physician should be granted privileges to perform FESS were those applicable to an ENT resident, not to a Board Certified Otorhinolaryngologist with considerable experience in intranasal sinus surgery.

FESS involves the performance of ethmoidectomy, sphenoidectomy, sphenoethmoidectomy, enlargement of the natural ostium of the maxillary sinus and excision of the uncinate process. I was trained in my residency in Otorhinolaryngology (ENT) to perform all of these procedures and have been performing all of them successfully and without complications since 1964. The only difference between FESS and the way I was trained is in the instrumentation for looking into the nose. The newer endoscopic instrumentation makes the procedure easier and safer by enhancing visualization of the operative site.

Research by a prominent Otorhinolaryngologist and acknowledged expert in FESS, [redacted] has shown that training courses in FESS have not reduced the complication rate in FESS performed by surgeons already trained in intranasal sinus surgery [page 40 and untranscribed portion of Reference (e)]. My competence has been proved by my performance of numerous FESS procedures without a single complication resulting from them.

iii. A critical statement of opinion unsupported by further evidence or

testimony has been repeatedly quoted as one of the prime reasons for revoking my FESS privileges. That statement is the Specialty Advisor's opinion that my surgical techniques were "unorthodox and incomplete". [redacted] was given three opportunities to explain that statement: first in a letter from Captain Felder to [redacted] requesting an explanation; second, in a telephone conversation between Captain Felder and [redacted] and finally, and most significantly, in [redacted] testimony before the Peer Review Panel. His failure or inability in all three instances to clarify or support his statement demonstrates that his statement is erroneous. When asked by my Counsel and Counsel for the CO to explain his comment, [redacted] replied that some of my terminology was different from what he had been taught [pages 33 and 38 of Reference (e)]. In fact, he and [redacted] testified at the hearing that the "unorthodox" techniques he referred to was antral lavage, which is unrelated to FESS [pages 38 and 79 of Reference (e)]. [redacted] admitted that competent ENT surgeons where he presently practices (San Diego) utilize this procedure [page 39 of Reference (e)]. [redacted] Head of the Otolaryngology Department at National Naval Medical Center in Bethesda, stated in writing (submitted to panel as Respondent's Exhibit 30) that he finds antral lavage a helpful and currently recognized procedure. (In any event, the record clearly demonstrates the inapplicability of this comment to FESS.)

C. To revoke a privilege which has already been granted and which the surgeon has demonstrated competence to perform is an adverse credentialling action with serious consequences. It cannot be based upon uneven application, persecution and abuse of discretion by the privileging authority. Revoking my FESS privileges under the circumstances present here while allowing all others "grandfathered" in to continue to exercise those privileges without satisfying the training requirements being applied to me epitomizes fundamental unfairness and abuse of discretion.

3. I respectfully request that my FESS privileges be restored for the period commencing 19 October 1993. In addition, I respectfully request that all references to any adverse credentialling actions be removed from my Individual Credentials File and from all other files and records, including the National Practitioner Data Bank, wherever they may be.

Very respectfully,

Gerald B. Felder

GERALD B. FELDER
CAPTAIN MC USN

DEPARTMENT OF THE NAVY
NAVAL HOSPITAL
6000 WEST HIGHWAY 98
PENSACOLA FL 32512-0003

6320
Ser OOJ/1264
25 May 94

From: Commanding Officer, Naval Hospital Pensacola
To: Chief, Bureau of Medicine and Surgery (MED-OOD3/MED-35)

Subj: APPEAL OF PRIVILEGING AUTHORITY'S FINAL DECISION IN THE CASE OF CAPTAIN J. B. FELDER, MC, USN

Ref: (a) BUMEDINST 6320.67
(b) CAPT J. B. Felder's ltr of 05 May 94
(c) Peer Review Panel Report of 30 March 94

Encl: (1) CAPT J. B. Felder's ltr of 05 May 94
(2) CO NAVHOSP Pensacola ltr 6320 Code OOJ of 22 April 94
(3) CAPT J. B. Felder's ltr of 12 April 94
(4) Peer Review Panel Report of 30 March 94

1. Per reference (a), enclosures (1) through (4) are forwarded for review.

2. In response to CAPT Felder's assertion that reference (a) was not complied with regarding providing him with a complete transcript, an imperceptible technical problem did occur with the taping equipment which caused the testimony of a character witness, [redacted] MSC, USN, and part of the testimony of another witness [redacted], USN, Specialty Advisor to the Navy's Otolaryngology Program, to be lost. This problem was not discovered until after the peer review hearing was concluded. After it was discovered, a copy of the transcript (without the lost testimony) was provided to CAPT Felder and he was told that a mutual effort to reconstruct the testimony would be undertaken. The Recorder and the Counsel for the Respondent have worked together to reconstruct the substance of the testimony which was lost. Through this effort, the material parts of the lost testimony were reconstructed to both sides satisfaction and included in the transcript. This allows for a substantially complete record of the Peer Review Panel hearing to be provided, and forwarded.

3. As the first basis for his appeal in reference (b), CAPT Felder contends that he is not being treated fairly or equitably in having his Functional Endoscopic Sinus Surgery (FESS) privileges revoked due to lack of appropriate training. His reason is [redacted] statement to the Peer Review Panel that 1/3 to 1/2 of the ENT surgeons presently performing FESS did not have the appropriate training while in residency; however [redacted] went on to say that a great majority of the Navy's ENT surgeons did take the necessary training post-residency and that to his knowledge, CAPT Felder is one of only a few ENT surgeons in the Navy without the appropriate training. Both [redacted] and [redacted], MC, USN, Staff ENT Surgeon, stated in their testimony that without the indicated formal training a surgeon performing FESS, with its inherent dangers of blindness, CSF leak and even death,

poses a risk to patient safety and should not be privileged to perform it. The Peer Review Panel also recommended that CAPT Felder not regain his supplemental privilege of FESS without appropriate training. Based on those authoritative opinions and recommendations, I, as the privileging authority at Naval Hospital Pensacola, strongly feel, that in the interest of patient safety and quality health care, any ENT surgeon who intends to perform FESS at this facility must have the indicated training in order to receive or maintain privileges in that procedure.

4. In reference (b), CAPT Felder also states that the members of the Peer Review Panel disregarded or misapprehended critical evidence in arriving at their decision in reference (c).

(a) The first issue he addresses is that [redacted] in doing his specialty review of three occurrences involving CAPT Felder, indicated that it did not appear to him from the information he reviewed that the complications were directly related to FESS. While that is true, [redacted] went on to say in his specialty review and in his testimony before the Peer Review Panel that he found CAPT Felder's FESS techniques to be unorthodox and incomplete which caused him to question CAPT Felder's qualifications to perform endoscopic sinus surgery. In addition, CAPT [redacted] stated that CAPT Felder has not had adequate training to safely perform FESS. Also before the Peer Review Panel was the testimony of [redacted] who assisted CAPT Felder on one of the aforementioned occurrences at the time when CAPT Felder's patient was returned to surgery due to continued post-operative bleeding. [redacted] stated that in his opinion the bleeding complication was due to the FESS procedure in that CAPT Felder attempted to place a nasal antral window for sinus drainage, but placed the hole in the bone incorrectly (too far posteriorly), resulting in cutting the sphenopalatine artery. [redacted] further stated that this is not somewhere you would want to put a hole to drain the sinus and was not just a tissue defect but a bone defect as well. Thus, there was evidence before the Peer Review Panel that not only does CAPT Felder not have the necessary training to perform FESS safely, but that there has also been an occurrence related to his performance of FESS.

(b) The next issue he addresses is that it was inappropriate for the Peer Review Panel to recommend that he be held to the indicated training standards when he is a Board Certified Otorhinolaryngologist with considerable experience in intranasal sinus surgery. In their testimony before the Peer Review Panel, both [redacted] and [redacted] stated that CAPT Felder did not have adequate training to safely perform FESS and should not be privileged to perform it. [redacted] also stated that experience, readings, and courses not meeting the criteria of appropriate training are not adequate substitutes for having the indicated training in a procedure of this nature with its potential risks to patient safety.

(c) CAPT Felder also addresses the issue of whether [redacted] adequately explained his opinion that CAPT Felder's FESS techniques were unorthodox and incomplete. [redacted] in his specialty review and in his testimony to the Peer Review Panel, stated that his opinion was based on his review of CAPT Felder's operative descriptions, which revealed terminology and procedures not being taught or published in FESS. Specifically, [redacted] stated that "CAPT Felder has done, I am sure, many sinus operations in, what we call the old technique, which I learned when I was training, which did not use endoscopes and was a more gross procedure that did not recognize the detailed anatomy that we now work on when we do the endoscopic procedures. His (CAPT Felder) descriptions d d not fit the modern anatomic descriptions that we now use." This is further supported by [redacted] testimony before the Peer Review Panel that CAPT Felder used the term anterior and posterior/inferior nasal antral window when discussing a FESS procedure, which is a term [redacted] says he has never heard before. With regard to the issue of sinus washing or antral lavage being unorthodox, [redacted] used that as an example to the investigating officer of how CAPT Felder is not keeping up to date with the newer medical techniques. [redacted] clarified this statement by testifying before the Peer Review Panel that antral lavage is still done when indicated; however it is not done, in his opinion, as a routine treatment for sinusitis or other sinus problems, because of the use topical decongestants and newer antibiotics.

5. Finally, CAPT Felder states that removing his privilege to perform FESS because he lacks the indicated training is unfair under the circumstances and is therefore an abuse of discretion. It is my duty as the privileging authority to take such action as is necessary to safeguard patient care from potential risk and to ensure quality health care. My decision to revoke CAPT Felder's supplemental privilege of FESS is based on information and recommendations from experts in the field of sinus surgery and from the Peer Review Panel's recommendation, that CAPT Felder does not have adequate training nor appropriate technique to safely perform FESS and should not be privileged to perform it. Consequently, my final action in revoking CAPT Felder's supplemental privilege of FESS is in no way unfair nor an abuse of discretion, but rather is a fulfillment of my duty, as privileging authority at Naval Hospital Pensacola.

6. If you have any questions, please contact my Staff Judge Advocate [redacted] at DSN: [redacted] or [redacted]

[redacted]

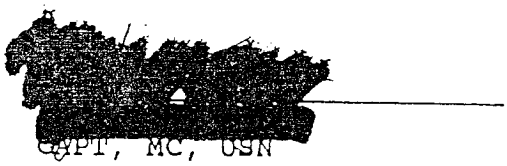
BUREAU OF MEDICINE AND SURGERY
ADVERSE PRIVILEGING APPEAL COMMITTEE
REPORT OF
13 SEPTEMBER 1994
IN THE CASE OF
CAPTAIN JERALD B. FELDER, MC, USN

1. It is the unanimous opinion of this committee that the provider's rights accorded in BUMED Instruction 6320.67 were protected.

2. It is the unanimous finding of this committee that there was no abuse of discretion by Commanding Officer, Naval Hospital, Pensacola in her decision to limit Captain Jerald B. Felder's clinical privileges by revoking his supplemental privileges to practice endoscopic sinus surgery.

3. It is the recommendation of this committee that the actions of Commanding Officer, Naval Hospital, Pensacola be approved.


CAPT, MC, USNR


CAPT, MC, USN


CAPT, MC, USN


LCDR, NC, USNR-R
(Non-voting attorney member)

DEPARTMENT OF THE NAVY
BUREAU OF MEDICINE AND SURGERY
2300 E STREET NW
WASHINGTON DC 20372-5300

IN REPLY REFER TO

6320/C93-059
Ser 362/4U213984
14 Sep 94

CERTIFIED MAIL - P 038 636 471 RETURN RECEIPT REQUESTED

From: Chief, Bureau of Medicine and Surgery
To: CAPT Jerald B. Felder, MC, USN
Via: Commanding Officer, Naval Hospital, Pensacola

Subj: ADVERSE PRIVILEGING ACTION APPEAL

Ref: (a) CO, NAVHOSP Pensacola ltr 6320 00J of 22 Apr 94
(b) Your ltr of 5 May 94
(c) BUMEDINST 6320.67

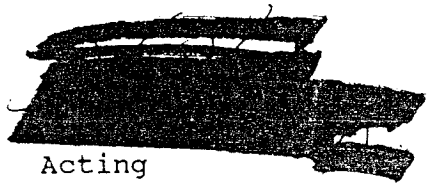
Encl: (1) BUMED Adverse Privileging Appeal Committee report ICO CAPT Jerald B. Felder, MC, USN (copy)

1. By reference (a) you were advised of the decision of Commanding Officer, Naval Hospital, Pensacola to limit your clinical privileges. By reference (b) you appealed that decision to me.

2. I have carefully reviewed your appeal, all relevant documentation, and the recommendations of the Bureau of Medicine and Surgery Adverse Privileging Appeal Committee (enclosure (1)).

3. Based upon my review, I find your rights under reference (c) were protected. The decision of Commanding Officer, Naval Hospital, Pensacola is approved.

4. This constitutes the final action on your appeal pursuant to reference (c).



Acting